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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 23, 1988

Question Presented

As a public service, petitioner bar association rates candidates for elective judicial office in the City of New York on the basis of its nonpartisan evaluation of their fitness for the bench, applying standards generally accepted in the legal profession. Petitioner never compares one candidate with another; candidates for the same judicial office frequently receive identical ratings. Although petitioner announces its ratings in press releases, it does not otherwise disseminate them to the general public or participate in any way in political campaigns for or against particular judicial candidates. The question presented is whether these activities constitute "participa[tion]" or "interven[tion]" in a "political campaign on behalf of (or in opposition to) any candidate for public office" so as to disqualify petitioner from recognition as a tax-exempt charitable and educational organization under Section 501(c)(3) of the Internal Revenue Code.

Rule 28.1 Statement

Petitioner has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner The Association of the Bar of the City of New York respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered September 27, 1988.

Opinions Below

The opinion of the Court of Appeals is reported at 858 F.2d 876 and is reprinted in the appendix hereto [1a-13a]. The opinions of the United States Tax Court [14a-41a] are reported at 89 T.C. 599. Respondent's final administrative determination [42a-43a] is unreported.

Jurisdiction

The judgment of the Court of Appeals [44a-45a] was dated and entered September 27, 1988. No rehearing was

sought. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Statute Involved

Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, 26 U.S.C. § 501(c)(3), is set forth in the appendix [46a].

Statement of the Case

Petitioner, a bar association in the City of New York, seeks qualification as a charitable and educational organization under Section 501(c)(3) of the Internal Revenue Code. Although for many years petitioner has been a "business league" exempt from federal income tax under Section 501(c)(6) of the Code, qualifying under Section 501(c)(3) would provide a number of significant additional advantages, including exemption from New York State and City sales and use taxes, eligibility for lower bulk-mail postal rates and the right to receive tax-deductible charitable contributions.

It is undisputed that petitioner meets all of the affirmative requirements for Section 501(c)(3) qualification. The sole dispute is whether petitioner must nevertheless be denied such qualification on the basis of that section's so-called "anti-electioneering" clause, which provides that qualification can be granted only to an organization that "does not participate in, or intervene in (including the publishing and distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." The Court below held that this provision disqualifies petitioner from Section 501(c)(3) status solely because, in an effort to improve the quality of the

judiciary, petitioner systematically assesses the professional qualifications of persons seeking judicial office in the City of New York, including candidates for election to the New York State Supreme Court (the state's trial court of general jurisdiction) and the New York City Civil Court.

Judicial elections in New York City are, in almost every case, either uncontested or noncompetitive. Many elections are uncontested because of cross-party endorsements. Even when there is more than one candidate for a single judgeship, the election is almost never competitive because the voters overwhelmingly support the nominee of the dominant Democratic Party. The record shows, for example, that of the 93 Supreme Court elections in the City of New York during the period 1978 through 1983, only *one* was in fact competitive.[1] A similar situation exists with respect to the New York City Civil Court. In practice, judges in New York City are chosen by local political leaders.[2]

Petitioner does not rate judicial candidates in the hope of affecting the outcome of specific elections, for that would be futile. Petitioner's aim, rather, is to induce political leaders to select professionally qualified judicial candidates and generally to build public support for a high-caliber judiciary.

Primarily through its Committee on the Judiciary, petitioner conducts a painstaking investigation and evaluation of each candidate's professional ability, experience, char-

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[1] Administrative Record, Exhibit 18-R(5), p. 79.

[2] Supreme Court nominees are chosen by judicial nominating conventions, not in primary elections. Although there are occasional primary contests for Civil Court nominations, experience demonstrates that candidates supported by the leaders of the local Democratic party are virtually assured of that party's nomination and therefore of election. *See* Fund for Modern Courts, *The Illusion of Democracy: New York City Civil Court Elections, 1980-1985*, at ix-x, 14-15 (1986).

acter, temperament and other qualifications for the specific court to which the candidate aspires. The candidate's rating —"Approved", "Not Approved" or "Approved as Highly Qualified"—represents a disinterested, nonpartisan assessment of that candidate's professional qualifications measured against standards having general acceptance in the legal profession. Because candidates are never compared with each other, several candidates for a single judicial office may and often do receive the same rating. Petitioner announces its ratings through press releases,[3] but it does not otherwise disseminate its ratings or in any way participate in judicial election campaigns.

Proceedings Below

In May 1982, petitioner applied to respondent for recognition as a charitable and educational organization under Section 501(c)(3) of the Internal Revenue Code. On December 19, 1985, respondent issued a final determination denying the application on the sole ground that petitioner's practice of rating candidates for election to the bench constitutes intervention or participation in political campaigns on behalf of or in opposition to candidates for public office.

To obtain review of that determination, petitioner brought a timely action in the United States Tax Court, invoking that Court's jurisdiction under 26 U.S.C. § 7428(a). On September 22, 1987, in a ten-to-six decision, the Tax Court held that petitioner qualifies as a Section 501(c)(3) organization. In the majority's view, the "mere practice of rating candidates for electoral office without more" does not constitute "prohibited campaign activity" [31a], and

[3] In 1981 petitioner discontinued its practice of announcing ratings in its own publications.

the announcement of such ratings by means of press releases is a "totally passive" activity that does not rise to the level of participation or intervention in political campaigns within the meaning of the statute [32a]. The majority found it significant that petitioner's ratings are based, not "on partisan or political preference," but "on each candidate's professional experience and technical ability as compared to standards that [it] intends to be objective" and that it does not make "comparisons between candidates seeking the same office" [31a].

The Court of Appeals reversed. Without disputing that petitioner's ratings are nonpartisan, disinterested and professional, the Court concluded that they constitute "prohibited political campaign activity" under Section 501(c)(3) [9a]. The Court reached that conclusion despite its express acknowledgement that petitioner's purpose is "to improve the administration of justice" [13a] and that its rating activities are "clearly in the public interest" [5a].

Reasons for Granting the Writ

The decision below will have a negative impact on the organized bar's efforts to aid in the selection of qualified jurists and to prevent political considerations from outweighing judicial fitness in all of the 43 states in which judges are popularly elected.

The decision does not turn on anything peculiar to petitioner; its sweep potentially touches every bar association that rates candidates for elective judicial office. As the Court of Appeals itself recognized, "Bar Associations across the State follow the practice of rating candidates for judicial office, and it is clearly in the public interest for them to do so" [5a]. The same can be said about bar associations in all sections of the country.

The prospect of adverse tax consequences will inevitably discourage the impartial professional evaluation of candidates for election to the bench by those best able to make such evaluations—members of the legal profession. At least one leading bar organization, the New York County Lawyers' Association, has already discontinued its practice of rating judicial candidates in order to retain its status under Section 501(c)(3). As a consequence of the decision below, other bar associations are likely to follow suit.

A.

The decision below is inimical to Section 501(c)(3)'s manifest purposes. As is apparent from its face, Section 501(c)(3) has the dual purpose of (a) aiding non-profit organizations operated exclusively for educational and certain other public-interest purposes by giving them specified tax benefits and (b) assuring that such organizations do not abuse these privileges by "electioneering," *i.e.*, participating or intervening in political campaigns for or against candidates for public office. In drawing the line between permissible educational activities and impermissible electioneering, the Court of Appeals improperly failed to give effect to *both* purposes.[4]

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[4] Respondent himself recognizes that the mere pendency of an election does not end the inquiry required by Section 501(c)(3) and that an organization's efforts to inform voters about the records and qualifications of candidates for election does not *per se* constitute "electioneering." *See, e.g.*, Revenue Ruling 86-95, 1986-2 Cum. Bull. 73 (holding a political forum on candidates' views is not "electioneering"); Revenue Ruling 80-282, 1980-2 Cum. Bull. 178 (contrasting of candidates' voting records on specific issues with organization's positions on these issues is not "electioneering"); Revenue Ruling 78-248, 1978-1 Cum. Bull. 154 (publication of candidates' voting records on selected issues is not "electioneering").

(footnote continued on following page)

Petitioner's judicial rating activities, like those of bar associations generally, are conducted as a public service pursuant to the mandate of Canon 8 of the Code of Professional Responsibility: "A Lawyer Should Assist in Improving the Legal System." Ethical Consideration 8-6 provides that lawyers have a "special responsibility" to "evaluate the qualifications" of persons seeking judicial office and "to aid in the selection of only those who are qualified" by reason of "integrity, competence, and suitable temperament." [5] What the Court of Appeals said twenty-nine years ago about petitioner's practice of rating judicial candidates is still true today:

> "Recommendations concerning judicial candidates have been non-partisan and reflect primarily an evaluation of the professional experience and technical ability of the candidates. . . . These activities clearly constitute a public service." *Dulles* v. *Johnson,* 273 F.2d 362, 366-367 (2d Cir. 1959), *cert. denied,* 364 U.S. 834 (1960).[6]

(footnote continued from preceding page)

Petitioner's rating activities, which consist of nothing more than public statements that specific candidates do or do not have the professional qualification for the judicial offices they seek, come well within the rationale of these rulings.

[5] Ethical Consideration 8-6 in relevant part provides:

> "Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified."

[6] In *Dulles* v. *Johnson,* the Court held petitioner qualified as a charitable and educational organization for federal estate-tax pur-

(footnote continued on following page)

In states like New York, where many judges are popularly elected, a lawyer's "special responsibility" to aid in the selection of qualified judges can be fulfilled only through public statements about the professional qualifications of judicial candidates. Informing the public of the professional qualifications of such candidates and seeking to "prevent political considerations from outweighing judicial fitness in the selection of judges" (Code of Professional Responsibility, EC-8) is precisely the sort of public-interest activity that Congress sought to encourage through the tax laws. As the Court below acknowledged, petitioner's purpose in rating judicial candidates is to prevent "political considerations from outweighing practical fitness" [5a]. It is ironic, therefore, that the Court nevertheless characterized petitioner's activities as political campaign activity [11a].

In both purpose and effect, petitioner's rating activities constitute voter education, not "electioneering." For reasons explained above, virtually all judicial elections in the City of New York—petitioner does not rate candidates for judicial election elsewhere—are either uncontested or noncompetitive. In such circumstances, it is entirely unrealistic to assume, as the Court below evidently did assume,[7] that petitioner's ratings in fact influence the out-

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(footnote continued from preceding page)

poses under a statute (present 26 U.S.C. § 2055) that at the time did not prohibit participation or invention in political campaigns. Such a prohibition, in terms identical to those of 26 U.S.C. 501(c)(3), was added by P.L. 91-172, 83 Stat. 487 (1969), effective January 1, 1970.

[7] The Court's sweeping generalization that bar association ratings "influence the voting public" [5a] does not purport to be based on the present record—the record in fact contains abundant evidence to the contrary—but on two publications, one a study of a single nonpartisan judicial election in Louisville, Kentucky (New York

(footnote continued on following page)

come of specific judicial elections. Petitioner's ratings are not made in a futile attempt to support or oppose particular judicial candidates, but to inform the public about the professional qualifications of the candidates chosen by local political leaders and to generate public support for an improved judiciary. Clearly, this is an educational purpose that Section 501(c)(3) seeks to promote rather than the "electioneering" that it forbids.

B.

The decision below is contrary not only to the statute's purpose but to its language. Petitioner's ratings, which measure the qualifications of judicial candidates against a fixed, generally accepted professional yardstick without reference to the qualifications of any other candidate and which are conveyed to the public solely through press releases, cannot reasonably be deemed participation or intervention in a political campaign. By ignoring the commonsense distinction between a "political campaign" and a disinterested, nonpartisan attempt to enlighten the public regarding the professional qualifications of those seeking judicial office, the Court below unjustifiably departed from the ordinary meaning of the statute's operative words.

The Court below also stretched the terms "participation" and "intervention" far beyond the meanings that other courts have attributed to them. For example, in *Christian Echoes Nat'l Ministry, Inc.* v. *United States*, 470 F.2d 849

(footnote continued from preceding page)

City elections are entirely partisan) and the other a newspaper article about claims made by a bar association in one upstate New York county. Significantly, the Court did not say that *petitioner* can "influence the voting public," and in light of the political realities in New York City, it obviously cannot.

(10th Cir. 1972), *cert. denied,* 414 U.S. 864 (1973), a religious organization was denied Section 501(c)(3) status in part because it "intervened in political campaigns" by "us[ing] its publications and broadcasts to attack [presidential and congressional] candidates and incumbents who were considered too liberal." *Id.* at 856. For example, "it urged followers to defeat Senator Fulbright" and "to elect conservatives like Senator Strom Thurmond." *Id.* Its "objective," the Court found, was "to change the composition of the federal government." *Id. See also Hammerstein* v. *Kelley,* 235 F. Supp. 60, 64 (E.D. Mo. 1964), *affirmed,* 349 F.2d 928 (8th Cir. 1965) (denying exempt status to medical society that urged its members to elect specific candidates and defeat others based on their positions on bills the society believed would lead to "socialized medicine").

What ultimately distinguishes petitioner's judicial rating activities from political campaigning of the sort involved in *Christian Echoes* and *Hammerstein* is that petitioner does not take a stand on any issue that can fairly be regarded as a matter of public controversy. In rating judicial candidates, petitioner does not support any political party or faction, any ideology, any legislative program or the aspirations of any individual candidate. It does not seek to advance the private interests of its members. As the Court below expressly recognized, petitioner's sole aim is to promote a professionally qualified judiciary, an objective shared by all citizens. Lawyers are uniquely qualified by ability, training, experience and opportunity to assess judges and would-be judges in light of established professional standards. If lawyers do not systematically inform the public about the professional qualifications of those seeking judgeships, the public will remain ignorant on this important subject and political leaders will retain unchecked control over judicial selection.

Petitioner's attempt to educate the public about the professional qualifications of its judges therefore bears no resemblance to the "political campaign" activity forbidden by Section 501(c)(3). In reaching a contrary conclusion, the Court below misconstrued this important provision of the tax laws in a way that is likely to have a deleterious effect on the bar's efforts to improve the judiciary.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A—Court of Appeals Decision Dated September 27, 1988

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1250—August Term, 1987

(Argued June 10, 1987 Decided September 27, 1988)

Docket No. 88-4001

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Petitioner-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

BEFORE:

VAN GRAAFEILAND, MAHONEY, *Circuit Judges,*
and METZNER, *District Judge**

Appeal from a decision of the United States Tax Court holding that the Association of the Bar of the City of New York qualifies as a tax-exempt charitable and educational organization under section 501(c)(3) of the Internal Revenue Code of 1954.

Reversed.

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* Senior District Judge of the Southern District of New York, sitting by designation.

Court of Appeals Decision

BRUCE R. ELLISON, Department of Justice, Washington, D.C., (William S. Rose, Jr., Assistant Attorney General, Gary R. Allen and Robert S. Pomerance, Attorneys, Tax Division, Department of Justice, Washington, D.C., of Counsel), *for Respondent-Appellant.*

M. BERNARD AIDINOFF, New York, N.Y., (Sullivan & Cromwell and Stephen A. Zorn, New York, N.Y., of Counsel), *for Petitioner-Appellee.*

VAN GRAAFEILAND, *Circuit Judge*:

Section 501(c)(3) of the Internal Revenue Code provides for the exemption from federal income tax of organizations operated exclusively for charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual. To qualify under that section, however, an organization must not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3), *as amended by* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10711, 101 Stat. 1330, 1330-464 (1987).

The Commissioner of Internal Revenue appeals from a decision of the United States Tax Court, *Association of the Bar* v. *Commissioner*, 89 T.C. 599, [1987 Transfer Binder] Tax Ct. Rep. (CCH) No. 44,199 (Sept. 17, 1987), in which the Association of the Bar of the City of New York was held to qualify as a tax-exempt charitable and educational organization within the meaning of section 501 (c)(3). The Tax Court reached this decision by holding

that the Association does not engage in forbidden political activity. For the reasons that follow, we reverse.

The Association was incorporated in 1871 by Special Act of the New York Legislature

> for the purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof.

1871 N.Y. Laws 819, amended 1924 N.Y. Laws 134. In order to carry out these purposes, the Association engages in a variety of activities, many of which are conducted through the Association's more than fifty standing committees.

One of the Association's significant activities is the rating of candidates for both appointive and elective judgeships at the municipal, state and federal level. This task is assigned to the Association's Committee on the Judiciary. The Committee considers a candidate's professional ability, experience, character, temperament and the possession of such special qualifications as the Committee deems desirable for judicial office. It then rates the candidate as either "approved", "not approved", or "approved as highly qualified". The ratings are communicated to the public in the form of press releases and are published in The Record of the Association of the Bar of the City of New York, a regular publication of the Association which is sent out to the Association's members and approximately 120 other subscribers, including libraries and law schools. A "not approved" rating may be accompanied on occasion by a short statement explaining the reasons for the rating.

In 1982, the Association applied to the Commissioner for recognition as a charitable and educational organization exempt from tax under section 501(c)(3). Although the Association already is exempt from federal income taxes under section 501(c)(6), qualifying under section 501 (c)(3) would give additional tax advantages to the Association and persons who contribute to it. For example, a section 501(c)(3) organization is eligible to receive charitable contributions which are tax-deductible to the donor for federal income, estate, and gift tax purposes. *See* 26 U.S.C. §§ 170(a)(1), (c)(2)(D), 2055(a)(2), 2106 (a)(2)(A)(ii) and 2522(a)(2).

The Commissioner denied the Association's application on the ground that the procedure followed by the Association in the rating of candidates for elective judicial office constituted intervention or participation in political campaigns on behalf of candidates for public office. Following this adverse determination, the Association brought an action in Tax Court for a declaratory judgment that it qualifies as a section 501(c)(3) organization. That Court, by a vote of ten to six, held that the Association's conduct in question does not constitute prohibited political activity and that the Association therefore qualifies as a section 501 (c)(3) organization. We disagree.

Canon 8 of New York's Code of Professional Responsibility provides "A Lawyer Should Assist in Improving the Legal System." N.Y. Code of Professional Responsibility Canon 8, *reprinted in* N.Y. Jud. Law App. (McKinney 1975). Ethical Consideration 8-6 elaborates on this provision as follows:

> Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally,

> lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. (footnotes omitted)

N.Y. Code of Professional Responsibility EC 8-6, *reprinted in* N.Y. Jud. Law App. (McKinney 1975).

There can be little question that lawyers take seriously the obligation imposed upon them by this Canon and Ethical Consideration. Bar Associations across the State follow the practice of rating candidates for judicial office, and it is clearly in the public interest for them to do so. *See Dulles* v. *Johnson,* 273 F.2d 362, 367 (2d Cir. 1959), *cert. denied,* 364 U.S. 834 (1960). The issue in the instant case, however, is not whether Bar Associations serve the public by rating candidates and publicizing their rating. It is whether they may do so and still claim tax exemptions which are not available under section 501(c)(3) to organizations which "participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

Court of Appeals Decision

The Association's by-law which describes the functions of the Committee on the Judiciary quite obviously conforms closely to Ethical Consideration 8-6. At the time the Association applied for section 501(c)(3) recognition, the by-law read in pertinent part as follows:

> The [C]ommittee [on the Judiciary] shall endeavor to secure the nomination, election, certification, or appointment of qualified candidates, to prevent the nomination, election, certification, or appointment of unqualified candidates, and to prevent political considerations from outweighing fitness in the selection of candidates for judicial office or for any other office connected with the administration of justice in the Court of Appeals of the State of New York, the Court of Claims of the State of New York, state and city courts in the City of New York, the United States Court of Appeals for the Second Circuit, and the United States District Courts for the Southern and Eastern Districts of New York, or for the office of District Attorney of any county within the City of New York or of United States Attorney in the Southern and Eastern Districts of New York. The committee shall consider the fitness of candidates proposed for nomination, appointment, or certification, or nominated for election to any such office, and may confer with any person or group with respect to any such candidate. The committee may prepare a list or lists of persons qualified to hold any such office and may confer with any person or group with respect thereto.

The Association indicated in its application that, if it was granted a conditional exemption, it would submit a

proposed amended by-law to its members that would omit all references to endeavors to "secure" or "prevent" the election of candidates. However, since it appears that the Committee's ratings would be publicized in the same manner under the proposed amended by-law as they were under the then-existing by-law, the issue whether such ratings and publications constitute prohibited campaign activity would continue to exist.

The findings of the Tax Court on this issue are ambivalent. The Court says that "[t]he ratings do not support or oppose the candidacy of any particular individual or recommend that the public vote for or against a specific candidate." *Association of the Bar* v. *Commissioner, supra,* [1987 Transfer Binder] Tax Ct. Rep. (CCH) at 3646. In almost the same breath, however, the Court states that it is "obvious that the ratings are published with the hope that they will have an impact on the voter." *Id.* Studies of Bar Associations' judicial ratings indicate that they do influence the voting public. *See* Goldstein, *Bar Poll Ratings as the Leading Influence on a Non-Partisan Judicial Election,* 63 Judicature 377 (1980); *see also Lawyers' Ratings Win Election,* Rochester Democrat and Chron., Nov. 5, 1981, at 5B (Monroe County Bar Association's statistical summary of its rating program). Certainly, a candidate for judicial office who receives a "not approved" Bar Association rating will believe that this is so.

As is evident from legislative history, government subsidization of political activity has been a matter of concern to Congress from the time Judge Learned Hand wrote that "[p]olitical agitation . . . however innocent the aim . . . must be conducted without public subvention . . . ." *Slee* v. *Commissioner,* 42 F.2d 184, 185 (2d Cir. 1930); *see Cammarano* v. *United States,* 358 U.S. 498 (1959). "A tax

exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income." *Regan* v. *Taxation with Representation of Washington,* 461 U.S. 540, 544 (1983). When Congress included tax exemptions to charitable and educational organizations in the Revenue Act of 1934, it excepted from exemption those organizations that devote a substantial part of their activities to "carrying on propaganda, or otherwise attempting, to influence legislation." Ch. 277, § 101(6), 48 Stat. 680, 700. That provision remains intact in present section 501(c)(3).

Section 501(c)(3) of the Internal Revenue Code of 1954 added to the group of excepted organizations those which participate or intervene in the political campaign of a candidate for public office. Pub. L. No. 83-591, § 501(c)(3), 68A Stat. 1, 163. "This provision merely expressly stated what had always been understood to be the law. Political campaigns did not fit within any of the specified purposes listed in the section." 9 Mertens, *Law of Federal Income Taxation* § 34.05 at 22; *see Haswell* v. *United States,* 500 F.2d 1133, 1140 (Ct. Cl. 1974), *cert. denied,* 419 U.S. 1107 (1975); *Herbert E. Fales* 9 B.T.A. 828 (1927). To remove any doubt as to the scope of this exception, Congress again amended section 501(c)(3) in 1987 to ban participation both "on behalf of" and "in opposition to" candidates for public office. Pub. L. No. 100-203, § 10711, 101 Stat. 1330, 1330-464. The House Report that accompanied this Bill states that "[t]he prohibition on political campaign activities . . . reflect[s] Congressional policies that the U.S. Treasury should be neutral in political affairs . . . ." H.R. Rep. No. 391, 100th Cong., 1st Sess. 1621, 1625 (1987); *see also* H.R. Rep. No. 413, 91st Cong. 1st Sess. 31-34; S. Rep. No. 552, 91st Cong.,

1st Sess. 46-49 (interpreting section 501(c)(3) to mean that "no degree of support for an individual's candidacy for public office is permitted").

The Association suggests several reasons why the proscription against participation or intervention in the campaigns of judicial candidates does not apply to its rating procedures. It argues, and we assume this to be so, that it evaluates judicial candidates on a nonpartisan basis. However, the statute and pertinent regulations thereunder are not limited in their application to the partisan campaigns of candidates representing recognized political parties. " 'Nonpartisan,' as used in the statute and regulations, need not refer to organized political parties." *Haswell* v. *United States, supra,* 500 F.2d at 1144. One need not be a party nominee to be a candidate for public office. *Matter of Burns* v. *Wiltse,* 200 Misc. 355, 357 (1951). "The term 'candidates for public office' means an individual who offers himself, or is proposed by others, as a contestant for an elective public office . . . ." Treas. Reg. (26 C.F.R.) 1.50(c)(3)-(1)(c)(3)(iii). Moreover, one may be a candidate without running an organized political campaign. "[A] campaign for a public office in a public election merely and simply means running for office, or candidacy for office, as the word is used in common parlance and as it is understood by the man in the street." *Norris* v. *United States,* 86 F.2d 379, 382 (8th Cir. 1936), *rev'd on other grounds,* 300 U.S. 564 (1937). Indeed, a candidate for judicial office is limited in his political campaign activities by Canon 7 of his own Code of Judicial Conduct. N.Y. Code of Judicial Conduct Canon 7, *reprinted* in N.Y. Jud. Law App. (McKinney 1975). A candidate who receives a "not qualified" rating will derive little comfort from the fact that the rating may have been made in a nonpartisan manner.

The Association also asserts that its "rating activity involves merely the collection and limited dissemination of objective data." Appellee's Brief at 10. We disagree. Objective data are data that are independent of what is personal or private in our apprehension and feelings, that use facts without distortion by personal feelings or prejudices and that are publicly or intersubjectively observable or verifiable, especially by scientific methods. *Webster's Third New International Dictionary* 1556 (1971). Objective representations have been described judicially as "representations of previous and present conditions and past events, which are susceptible of exact knowledge and correct statement." *United Ben. Life Inc. Co.* v. *Knapp,* 175 Okla. 25, 26, 51 P.2d 963, 964 (1935). A belief that something is so does not make it so. *Mayer Tank Mfg. Co.* v. *Commissioner,* 126 F.2d 588, 591 & n.4. (2d Cir. 1942). *See also Hayes* v. *Gardner,* 376 F.2d 517, 520 (4th Cir. 1967) (objective medical facts are the clinical findings of physicians devoid from their opinions as to the significance of the findings). A representation that a candidate is a lawyer or a judge is a readily provable statement of objective fact. A representation that a candidate is able and has proper character and temperament is simply a subjective expression of opinion. The Tax Court recognized quite correctly that "ratings, by their very nature, necessarily will reflect the philosophy of the organization conducting such activities," and they are simply expressions of "professional opinion" concerning the candidates' qualifications. *Association of the Bar* v. *Commissioner, supra,* [1987 Transfer Binder] Tax Ct. Rep. (CCH) at 3646.

Published expressions of such opinion, made with an eye toward imminent elections, are a far cry from the revenue rulings upon which the Association relies. *See, e.g.* 80-282,

where, in holding that the publication of a newsletter by an organization otherwise qualifying for section 501(c)(3) exemption did not constitute proscribed political activity, the IRS emphasized the following factors:

1. "[T]he voting records of all incumbents will be presented;"
2. "[C]andidates for reelection will not be identified;"
3. "[N]o comment will be made on an individual's overall qualifications for public office;"
4. "[N]o statements expressly or impliedly endorsing or rejecting any incumbent as a candidate for public office will be offered;"
5. [T]he organization will not widely distribute its compilation of incumbents' voting records;"
6. "No attempt will be made to target the publication toward particular areas in which elections are occurring nor to time the date of publication to coincide with an election campaign."

The inapplicability of these criteria to the activities of the Association is readily apparent. Indeed, the Association concedes that it is attempting to "ensure" that candidates whom it considers to be "legally and professionally unqualified" are not elected to office. Appellee's Brief at 8. In pursuing this activity, the Association falls clearly within the definition of an "action" organization, *i.e.*, one that "participates or intervenes, directly or *indirectly*, in any political campaign on behalf of or in opposition to any candidates for public office." Treas. Reg. (C.F.R.) 1.501(c)(3)-1(c)(3)(iii) (emphasis supplied). *See* Rev. Rul. 67-71.

We note in passing that, except for an occasional attempt to justify a "not qualified" rating, no reasons are given for the ratings assigned by the Association. Although we see no need to reach this issue, we note the possibility of a conflict between this procedure and Treas. Reg. (26 C.F.R.) 1.501(c)(3)-1(d)(3)(b), which holds that advocated viewpoints unaccompanied by sufficient pertinent facts to permit members of the public to form their own independent opinions, cannot be considered educational in nature. *See Association of the Bar* v. *Commissioner, supra,* [1987 Transfer Binder] Tax Ct. Rep. (CCH) at 3647-50 (Chabot, J., dissenting) (Parker, Cohen, Clapp, Jacobs and Wright, J.J., concurring in the dissent).

Finally, the Association contends that the phrase "substantial part of its activities" as used in the proscription against the influencing of legislation should be carried over into the proscription against participating in any political campaign. "The short answer [to this argument] is that Congress did not write the statute that way." *United States* v. *Naftalin,* 441 U.S. 768, 773 (1979); *see also Russello* v. *United States,* 464 U.S. 16, 23 (1983). As above noted, the exception from section 501(c)(3) exemption of an organization that participates in political campaigns was added to the section some twenty years after the exception based on the influencing of legislation. Had Congress intended the added exception to apply only to those organizations that devote a substantial part of their activity to participation in political campaigns, it easily could have said so. It did not. Indeed, since it is most unlikely as a practical matter that any charitable organization would devote a substantial part of either its activity or its budget to the sporadic and relatively inexpensive rating of candidates for public office, the interpretation of section 501(c)(3) urged by the

Association would make this portion of section 501(c)(3) substantially meaningless. Congress did not intend it to be so. "[A]lthough the present provisions of Section 501 (c)(3) permit some degree of influencing legislation by a Section 501(c)(3) organization, it provides that no degree of support for an individual's candidacy for public office is permitted." H.R. Rep. No. 413 91st Cong., 1st Sess. 32 (1969); S. Rep. No. 552 91st Cong., 1st Sess. 47 (1969). "It should be noted that exemption is lost . . . by participation in *any* political campaign on behalf of *any* candidate for public office. It need not form a *substantial* part of the organization's activities." *United States* v. *Dykema,* 666 F.2d 1096, 1101 (7th Cir. 1981), *cert. denied,* 456 U.S. 983 (1982); *see Hutchinson Baseball Enterprises, Inc.* v. *Commissioner,* 696 F.2d 757, 760 (10th Cir. 1982).

Needless to say, the members of this panel, whose combined years of Bar Association membership total well over a century, empathize with the efforts of such Associations to improve the administration of justice. We recognize, however, that it is not within our province to grant Bar Associations a tax exemption that Congress has not seen fit to grant. "Courts should not 'rewrite a statute because they might deem its effects susceptible of improvement.' " *Brock* v. *Lindemann,* No. 87-1556 (5th Cir. 1988) (quoting *Badaracco* v. *Commissioner,* 464 U.S. 386, 398 (1984)).

The decision of the Tax Court is reversed.

APPENDIX B—Tax Court Decision Filed September 17, 1987

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, PETITIONER v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 6715-86X. Filed September 17, 1987.

Petitioner seeks a declaratory judgment from respondent's adverse final determination that petitioner is not an organization described in sec. 501(c)(3), I.R.C. 1954. Respondent determined that petitioner is an "action" organization, as defined in sec. 1.50(c)(3)-1(c)(3)(iii), Income Tax Regs., because petitioner's practice of rating candidates for elective judicial offices constitutes participation or intervention in any political campaign on behalf of any candidate for public office, within the meaning of sec. 501(c)(3). *Held,* the mere act of rating candidates for judicial office, without more, does not constitute prohibited political campaign activities, and therefore petitioner is an organization entitled to tax-exempt status under sec. 501(a) as an organization described in sec. 501(c)(3).

M. Bernard Aidinoff and *Karen L. Halby,* for the petitioners.

Vincent J. Guiliano, for the respondent.

OPINION

STERRETT, *Chief Judge:* Petitioner, the Association of the Bar of the City of New York, seeks a declaratory judgment pursuant to section 7428(a)[1] that it is exempt

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[1] Unless otherwise indicated, all section references are to the Internal Revenue Code as in effect during the taxable years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

from taxation under section 501(a) as an organization described in section 501(c)(3). The sole issue for decision is whether petitioner's practice of rating judicial candidates for public office constitutes participation or intervention in political campaigns on behalf of such candidates, which is prohibited by section 501(c)(3).[2]

This case was submitted for decision on the stipulated administrative record under Rule 122. The facts and representations contained therein are assumed to be true for purposes of this proceeding and are incorporated herein by this reference. Rule 217(b)(1). Petitioner has exhausted its administrative remedies as required by section 7428(b)(2) and Rule 210(c)(4) and filed its petition for declaratory judgment (exempt organization) in this case on March 14, 1986.

Petitioner, a bar association, was incorporated by a special act of the New York Legislature, passed on April 28, 1871 (chapter 819, New York Laws of 1871, amended chapter 134, New York Laws of 1924)—

> for the purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof.

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[2] Sec. 501(c)(3) was not amended by the Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085. However, we note that just prior to publication of this opinion, legislation was introduced in Congress to amend sec. 501(c)(3) and related sections, referred to as "The Tax-Exempt Organizations' Lobbying and Political Activities Accountability Act of 1987." The proposed legislation would, inter alia, impose new disclosure requirements, excise taxes, and additional taxes, and would authorize injunctive action with respect to prohibited lobbying and political activities by tax-exempt organizations described in sec. 501(c)(3). H.R. 2941 100th Cong., 1st Sess. (1987).

At the time it filed its petition in this case, petitioner's principal place of business was located at 42 West 44th Street, New York, New York.

Petitioner has been recognized as exempt from Federal income tax under the Internal Revenue Code of 1939 as an organization described in the predecessor of current section 501(c)(6).[3] On May 25, 1982, petitioner filed an initial request with respodent's Office of the District Director in Manhattan for recognition as a tax-exempt charitable and educational organization, "Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code," Form 1023 (the application). In the application, petitioner stated that it did not and will not engage in activities tending to influence legislation or intervene in any way with political campaigns.

Petitioner's primary activities are educational and include sponsoring a substantial number of lectures, symposia, and panel discussions for members of the legal profession and the general public, maintaining an extensive law library, organizing and administering an annual moot court competition, and publishing numerous educational materials. In its request for recognition of tax-exempt status, petitioner stated that among its principal activities, it—

> Considers the qualifications of candidates for judicial office or for any other office connected with the administration of justice. Candidates are considered in an objective and nonpartisan manner on the

[3] There is no express statutory prohibition against participation or intervention in political campaigns under sec. 501(c)(6). However, unlike sec. 501(c)(6), contributions to organizations described in sec. 501(c)(3) are deductible for Federal income, estate and gift tax purposes. See secs. 170(a)(1) and (c)(2)(D), 2055(a)(2), 2106(a)(2)(A)(ii), and 2522(a)(2).

> basis of their professional ability, experience, character and temperament and are rated as "approved", "not approved" or "approved as highly qualified".

Many of petitioner's activities are conducted through its more than 50 standing committees, each of which is assigned responsibility with respect to a particular area of the law. The standing committees include the committee on the civil court of the city of New York; the committee on criminal courts; the committee on the family court and family law; the committee on the Federal courts; the committee on State courts of superior jurisdiction; and the committee on the trusts, estates, and surrogates' courts, all of which are collectively referred to as the court committees, and the committee on the judiciary.

Through its court committees and its committee on the judiciary, petitioner engages in various activities intended to facilitate the fair and orderly administration of justice. The court committees are authorized to observe courts and make such reports and recommendations as they deem advisable, and to investigate the conduct and the qualifications of judicial officers, and candidates therefor, and other persons connected with the administration of justice. The committee on the judiciary has the authority to rate candidates for various elective and appointive judicial offices enumerated below.

At the time of the application, petitioner's bylaws provided that—

> 2. The committee [on the judiciary] shall endeavor to secure the nomination, election, certification, or appointment of qualified candidates, to prevent the nomination, election, certification, or appointment of unqualified candidates, and to pre-

> vent political considerations from outweighing fitness in the selection of candidates for judicial office or for any other office connected with the administration of justice in the Court of Appeals of the State of New York, the Court of Claims of the State of New York, state and city courts in the City of New York, the United States Court of Appeals for the Second Circuit, and the United States District Courts for the Southern and Eastern Districts of New York, or for the office of District Attorney of any county within the City of New York or of United States Attorney in the Southern and Eastern Districts of New York. The committee shall consider the fitness of candidates proposed for nomination, appointment, or certification, or nominated for election to any such office, and may confer with any person or group with respect to any such candidate. The committee may prepare a list or lists of persons qualified to hold any such office and may confer with any person or group with respect thereto.

Included in the application was a proposed amendment to petitioner's bylaws to substitute the following language for the paragraph cited above:

> 2. The committee [on the judiciary] shall consider the fitness of candidates proposed for nomination, appointment, or certification or nominated for election to judicial office or to any other office connected with the administration of justice in the Court of Appeals of the State of New York, the Court of Claims of the State of New York, state and city courts in the City of New York, the United States Court of Appeals for the Second Circuit, and

> the United States District Courts for the Southern and Eastern Districts of New York, or for the office of District Attorney of any county within the City of New York or of United States Attorney in the Southern and Eastern Districts of New York. The candidates shall be rated as "Approved", "Not Approved" or "Approved as highly qualified" as may be appropriate. In rating a candidate, the committee may confer with any person or group and shall consider the candidate's professional ability, experience, character, temperament and the candidate's possession of such special qualifications as may be necessary or desirable for the performance of the duties of the office for which the candidate is being considered. The rating shall be conducted in an objective and nonpartisan manner.

The committee on the judiciary's latitude is limited to rating candidates as either "approved," "not approved," or "approved as highly qualified." More than one candidate for the same office may receive the same rating. Ratings generally depend upon a comparison of each candidate's competence, ability, and other qualities with standards set by petitioner and not upon comparisons among the candidates. A "not approved" rating often includes a short statement explaining the reason for such rating; no explanation is given for the other ratings. A candidate who receives a "not approved" rating by less than a unanimous vote also may appeal to the executive committee, which shall apprise the candidate of the nature of the information upon which the rating was based.

Candidates are rated in accordance with the following procedure:

(1) A subcommittee is formed to conduct the initial investigations;

(2) In the case of a sitting judge, the subcommittee's activities include:

(a) conducting a personal interview,

(b) reviewing any professional writings of the candidate, including recent opinions,

(c) reviewing the record of one or more recent trials over which the judge presided, and

(d) conducting such other investigations as it considers appropriate;

(3) The subcommittee submits its recommendations to the full Committee on the Judiciary, which may also interview the condidates;

(4) The rating assigned to a candidate is assigned by the full Committee on the Judiciary;

(5) Candidates rated "Not Approved" with a minimum number of dissenting votes are (a) notified of the conclusion, (b) apprised of the bases for the conclusion, and (c) advised of the right to appeal the rating to petitioner's Executive Committee.

The ratings are released to the public in the form of press releases and have been published in The Record of the Association of the Bar of the City of New York (the Record), petitioner's official publication, which is disseminated

to petitioner's members and approximately 120 subscribers, most of which are libraries and law schools.[4]

More than one candidate for a given position may, and often does, receive the same rating. On occasion, all of the candidates for a given position have received identical ratings. For example, in November 1981, all of the judicial candidates for the 11th judicial district of the supreme court and for the 4th and 6th districts of the civil court in New York County were rated as "approved."

From 1980 through 1984, the committee on the judiciary rated a total of 272 candidates for judicial offices in the supreme court of the State of New York (supreme court) and the civil court of the city of New York (civil court), as follows:

	Court	*Approved*	*Not approved*	*Approved as highly qualified*	*Total*
1980	Supreme Court	17	3	0	20
	Civil Court	8	7	0	15
1981	Supreme Court	14	3	0	17
	Civil Court	18	18	1	37
1982	Supreme Court	35	19	2	56
	Civil Court	15	11	0	26
1983	Supreme Court	14	10	1	25
	Civil Court	14	18	0	32
1984	Supreme Court	6	10	1	17
	Civil Court	12	15	0	27
	Total	153	114	5	272

[4] The administrative record states simply that the ratings are published in the Record, although petitioner contends that it has not published its ratings therein since 1981. We are unable to verify petitioner's contention from the record before us.

Tax Court Decision

Respondent issued a proposed adverse determination letter (the proposed determination), dated June 7, 1983, with respect to petitioner's application for recognition of tax-exempt status. The proposed determination concluded that petitioner's practice of rating candidates for elective judicial office is a proscribed political activity that violates the "operational test" set forth in section 1.501(c)(3)-1(c), Income Tax Regs, and therefore precludes petitioner's classification as an organization described in sec. 501(c)(3).[5] It also stated that contributions to petitioner were not deductible under section 170. The proposed determination expressly stated that the denial of petitioner's request for exemption under section 501(c)(3) did not adversely affect petitioner's status as a tax-exempt organization for purposes of section 501(c)(6).

On September 23, 1983, petitioner filed a timely protest of the proposed determination (the protest). Petitioner received written notification from the District Director of respondent's exempt organizations technical staff, dated

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[5] The proposed determination also stated that petitioner failed to satisfy the "operational test" in sec. 1.501(c)(3)-1(c), Income Tax Regs., because (1) petitioner's practice of reviewing existing and proposed legislation constituted proscribed legislative activities, and (2) certain other activities of petitioner were not purely educational and for the benefit of the general public but rather tended to promote the legal profession.

The proposed determination further stated that petitioner also failed to satisfy the "organization test" in sec. 1.501(c)(3)-1(b), Income Tax Regs., because (1) petitioner's charter did not exclusively limit its purposes to sec. 501(c)(3) purposes, and (2) upon dissolution, petitioner's assets were not dedicated to sec. 501(c)(3) purposes. However, in the application, petitioner included a proposed amendment to its charter, to be submitted to its members following conditional exemption, which was intended to provide an acceptable method of distribution of petitioner's assets upon dissolution in order to comply with the requirements of sec. 1.501(c)(3)-1(b)(4), Income Tax Regs.

December 23, 1983, that the protest did not alter respondent's original determination. This case was forwarded to respondent's Office of the Regional Director of Appeals for further consideration and, on January 19, 1984, petitioner met with respondent's appeals officer. In a letter dated April 3, 1984, petitioner requested that the issues presented in the proposed determination and the protest be submitted to respondent's National Office for technical advice.

On March 22, 1985, petitioner submitted to respondent's National Office certain additional information, requested by respondent during a conference between the parties on January 9, 1985, with respect to petitioner's practice of rating candidates for election to judicial office, as well as with respect to petitioner's legal referral service program, legislative, and social activities.

On November 5, 1985, respondent's National Office issued a Technical Advice Memorandum that concluded that petitioner did not qualify for exemption from Federal income tax under section 501(c)(3) because petitioner "is participating or intervening in political campaigns on behalf of candidates for public office, an activity that is prohibited under section 501(c)(3) of the Code." [6] On December 19, 1985, respondent issued a final adverse determination letter (the final determination) that denied petitioner's application for recognition of tax-exempt status as an organization described in section 501(c)(3) based upon the determination that petitioner's "rating activities constitute intervention or participation in political campaigns on behalf of

[6] The Technical Advice Memorandum also stated that, with respect to petitioner's legislative activities, if petitioner otherwise qualified for exemption it would be entitled to make an election under sec. 501(h) and would fall safely within the parameters of secs. 501(c)(3) and 4911. See note 4 *supra*.

candidates for public office which is prohibited under section 501(c)(3) of the Code." The final determination also concluded that contributions to petitioner are not deductible under section 170.

Section 501(a)[7] provides for the exemption from Federal taxation of certain organizations described in section 501(c). Section 501(c)(3) includes corporations organized and operated exclusively for one or more specified exempt purposes (see sec. 1.501(c)(3)-1(a)—(c), Income Tax Regs.), provided that such exempt organizaitions do not "participate in, or intervene in (including the publish-

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[7] Sec. 501 provides in relevant part as follows:

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

(a) EXEMPTION FROM TAXATION.—An organization described in subsection (c) * * * shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

* * * * * * * *

(c) LIST OF EXEMPT ORGANIZATIONS.—The following organizations are referred to in subsection (a):

* * * * * * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

* * * * * * * *

(6) Business leagues, chambers of commerce, real-estate boards of trade * * * not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

ing or distributing of statements), any political campaign on behalf of any candidate for public office." The narrow issue for decision is whether respondent has properly denied petitioner's application for tax-exempt status based upon the determination that petitioner's practice of rating judicial candidates constitutes prohibited political campaign activities within the meaning of section 501(c)(3).[8] The burden of proof is on petitioner to overcome the grounds stated in respondent's adverse final determination letter. *First Libertarian Church* v. *Commissioner*, 74 T.C. 396, 402 (1980); Rule 217(c)(2)(i).

The basis for respondent's adverse determination is that petitioner's rating activities violate the "operational test" set forth in the regulations promulgated under section 501(c)(3).[9] Respondent argues that petitioner is not oper-

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[8] Alternatively, petitioner argues that its rating activities represent an insubstantial part of its overall educational and charitable activities and therefore should not result in the denial of sec. 501(c)(3) status. Respondent argues that, even though sec. 501(c)(3) permits an insubstantial amount of certain nonexempt activities, the prohibition against participation or intervention in political campaigns is absolute and is not subject to a substantiality test.

Based upon the analysis below, we need not address the parties' positions with respect to these arguments. However, we note that petitioner's rating activities are among many activities conducted by its more than 50 standing committees and, as respondent stated in his Technical Advice Memorandum, "It is quite clear that [petitioner's] primary activities are educational." We find that petitioner's ratings constitute an insubstantial part of its overall exempt activities.

[9] Sec. 1.501(c)(3)-1, Income Tax Regs., provides in relevant part as follows:

> (c) *Operational test.* (1) *Primary activities.* An organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

ated exclusively for exempt purposes because it is an "action" organization, defined in the regulations as follows:

> An organization is an "action" organization if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. The term "candidate for public office" means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State or local. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate. [Sec. 1.501(c)(3)-1(c)(3)(iii), Income Tax Regs.[10]]

Whether an organization satisfies the "operational test" is a question of fact to be resolved on the basis of all of the evidence presented by the record. *Church of Scientology of California* v. *Commissioner,* 83 T.C. 381, 474 (1984), affd. 823 F.2d 1310 (9th Cir. 1987).

The Court of Appeals for the Second Circuit, to which this case would be appealable, has held that, based upon its total operations, petitioner is a scientific, educational, and

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[10] Although respondent no longer argues that petitioner also fails to satisfy the "organizational test" set forth in the regulations, we note that the regulations provide that an organization is not organized exclusively for one or more exempt purposes if its articles of organization expressly empower it "Directly or indirectly to participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of or in opposition to any candidate for public office." Sec. 1.501(c)(3)-1(b)(3)(ii), Income Tax Regs.

charitable organization such that for Federal estate tax purposes, certain conveyances to petitioner constitute charitable bequests. *Dulles* v. *Johnson,* 273 F.2d 362, 367-368 (2d Cir. 1959).[11] However, that case was decided under section 812(d) of the Internal Revenue Code of 1939, the predecessor of current section 2055, which had no express prohibition against political campaign activities.[12] The parties agree that its decision is not dispositive of the issue presented here.[13] Nevertheless, petitioner maintains that the decision supports its position that its practice of rating judicial candidates is consistent with charitable and educational purposes, citing the following language therefrom:

> There is no dispute but that * * * [petitioner has] probed into the qualifications of candidates for

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[11] Respondent has announced that it will not follow the decision in *Dulles* v. *Johnson,* 273 F.2d 362 (2d Cir. 1959). Rev. Rul. 71-505, 1971-2 C.B. 283.

[12] Sec. 101(6) of the Internal Revenue Code of 1939, the predecessor of current sec. 501(c)(3), also had no such express prohibition. The language "and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office" was added to section 501(c)(3) of the bill that was enacted as the Internal Revenue Code of 1954. Pub. L. 591, 68A Stat. 3, by a floor amendment of then-Senator Lyndon B. Johnson, 100 Cong. Rec. 9604 (July 2, 1954); No. 102a(2) to H. R. 8300, 83d Cong., 2d Sess. 205 (1954); H Rept. 2543, 83d Cong., 2d Sess. 46 (1954).

Identical statutory language was added to secs. 170(c)(2)(D), 2055(a)(2), 2106(a)(2)(A), and 2522(a)(2) of the Internal Revenue Code of 1954 by secs. 201(a) and 201(d)(4)(A)-(C) of the Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487, 549, 561.

[13] Respondent represents, as a second issue for decision, that based upon either the doctrine of collateral estoppel or res judicata, the decision in *Dulles* v. *Johnson, supra,* does not bar his denial of petitioner's application for tax-exempt status. Inasmuch as petitioner agrees that its classification under sec. 501(c)(3) is not mandated by that decision based upon either of such doctrines, we need not address respondent's arguments.

> judicial office. * * * Recommendations concerning judicial candidates have been non-partisan and reflect primarily an evaluation of the professional experience and technical ability of the candidates. Here the committees perform a most valuable function, for lawyers are peculiarly well equipped to seek out and remedy flaws in the judicial machinery and to assess the performances and capabilities of judges. In today's immensely complex society they alone, perhaps, are alert to watch for and attempt correction of manifest defects prior to the time when malfunctions become apparent to everyone. These activities clearly constitute a public service, and we fail to discern that they indicate that * * * [petitioner] seek[s] to achieve a selfish professional benefit thereby. [273 F. 2d at 366-367.]

Here, respondent does not focus on any "selfish professional benefit" achieved by petitioner but rather whether the rating activities violate the specific language of section 501(c)(3), as amended subsequent to the decision in *Dulles* v. *Johnson,* regardless of petitioner's motive or whether such activities benefit the public.

The parties agree that certain nonpartisan "voter education" activities do not constitute prohibited political campaign activities within the meaning of section 501(c)(3). Therefore, the issue presented may be more narrowly redefined as whether respondent has properly determined that petitioner's rating activities do not constitute permissible voter education activities.[14] In resolving this matter, we are limited to an examination of the administrative record.

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[14] Both parties argue their positions in terms of several revenue rulings published by respondent, particularly Rev. Rul. 78-248,

(footnote continued on following page)

Tax Court Decision

The proposed amendment to petitioner's bylaws authorizes the committee on the judiciary to investigate the qualifications of judicial candidates upon consideration of their professional ability, experience, character, temperament, and other special qualifications.[15] Petitioner maintains that its ratings are designed to inform the public whether professionals practicing in the legal field believe that the candidates possess the necessary technical ability and professional qualifications for judicial office.

In *Christian Echoes National Ministry, Inc.* v. *United States,* 470 F.2d 849 (10th Cir. 1972), a religious organization was denied section 501(c)(3) status, in part, because of its intervention in political campaigns. The court found that although the organization did not formally endorse specific candidates, it used its publications and broadcasts to urge support for certain candidates and to attack others. 470 F.2d at 856-857. Petitioner argues that under *Christian Echoes,* prohibited political campaign activities encompass attempts to influence the outcome of campaigns but not the mere publication of information about candidates. Respondent argues that, even assuming petitioner's interpretation of that decision is correct, the real purpose of petitioner's ratings is to influence the election of judges in the New York City area.

(footnote continued from preceding page)

1978-1 C.B. 154 (revoking Rev. Rul. 78-160, 1978-1 C.B. 153), and Rev. Rul. 80-282, 1980-2 C.B. 178, which amplified Rev. Rul. 78-248. Respondent concedes that the facts of the instant case are distinguishable from those in Rev. Rul. 67-71, 1967-1 C.B. 125. However, absent special circumstances, revenue rulings merely represent respondent's position with respect to a specific factual situation (*Haley Bros. Construction Corp.* v. *Commissioner,* 87 T.C. 498, 517 n. 21 and cases cited therein (1986)), and are not precedential in this Court. *Gordon* v. *Commissioner,* 88 T.C. 630, 635 (1987).

[15] Of course, the analysis herein is based upon the assumption that such proposed amendment will be adopted by petitioner's members.

We find that petitioner's practice of rating judicial candidates does not constitute prohibited interference with political elections. The ratings do not support or oppose the candidacy of any particular individual or recommend that the public vote for or against a specific candidate. Rather, petitioner is limited to evaluating candidates as either "approved," "not approved," or "approved as highly qualified." More than one candidate for a given office may, and often does, receive the same rating; in certain instances, each of the candidates for a given office has received the same rating.[16]

Respondent argues that, by its ratings, petitioner intervenes in political campaigns because it injects its subjective "ideal standards" of judicial candidates, which respondent contends is the very activity that section 501(c)(3) is meant to prevent. The prohibition against political campaign activities by section 501(c)(3) organizations stems from the general policy that the Federal Government should be neutral in political matters and therefore should not directly or indirectly subsidize such activities. See *Cammarano* v. *United States*, 358 U.S. 498, 512-513 (1959); *Slee* v. *Commissioner*, 42 F.2d 184, 185-186 (2d Cir. 1930), affg. 15 B.T.A. 710 (1929); *Christian Echoes National Ministry, Inc.* v. *United States, supra* at 854.[17]

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[16] Also compare with *Hammerstein* v. *Kelley*, 235 F. Supp. 60, 64-66 (E.D. Mo. 1964), affd. 349 F.2d 928 (8th Cir. 1965), in which a bequest to a medical society did not constitute a charitable transfer, in part, because the organization urged support for or opposition to specific candidates. The organization's endorsements prevented it from being classified as a charitable organization within the meaning of sec. 2055, as in effect prior to amendment by the Tax Reform Act of 1969. See note 11 *supra*.

[17] See also *Bowman* v. *Commissioner*, T.C. Memo. 1976-206; cf. *Abortion Rights Mobilization, Inc.* v. *Regan*, 544 F. Supp. 471, 486-487 (S.D. N.Y. 1982).

We are aware of the potential for abuse inherent in the types of activities engaged in by petitioner, and recognize that ratings, by their very nature, necessarily will reflect the philosophy of the organization conducting such activities. Further, there obviously would be no point to making the ratings if they were kept secret, and it is equally obvious that the ratings are published with the hope that they will have an impact on the voter. Nonetheless, we do not believe that the mere practice of rating candidates for elective office without more is, per se, a prohibited political campaign activity. While not determinative, it is noteworthy that petitioner states that one of the purposes of its ratings is "to prevent political considerations from outweighing fitness in the selection of candidates."

Petitioner does not base its ratings on partisan or political preferences. The ratings are based on each candidate's professional experience and technical ability as compared to standards that petitioner intends to be objective. It is significant that the ratings are not based upon comparisons between candidates seeking the same office. Additionally, "not approved" ratings often include short statements explaining such conclusions, which enable voters to decide whether they agree with the negative evaluations; no such explanations accompany either the "approved" or "approved as highly qualified" ratings, as those candidates are determined to be fit for the offices they seek.

Respondent also argues that petitioner's publication of its ratings in the Record and as press releases constitutes intervention in political campaigns. He adds that petitioner's ratings of candidates prior to primary elections evidence its attempt to secure the nomination and election of particular candidates. However, it is important to note that, so far as the administrative record reveals, petitioner merely reports its ratings and does not actively seek to influence

the outcome of elections, for example, by distributing statements or other campaign literature on behalf of or in opposition to any candidate. In the tax parlance of the day, petitioner's announcement of its ratings is a totally passive, not active, activity. Rather, petitioner evaluates solely whether, in its professional opinion, each of the candidates is qualified for the office he seeks.

We conclude that, based upon all of the facts and representations contained in the administrative record, petitioner's rating activities do not constitute prohibited political campaign activities within the meaning of section 501(c)(3). We find for petitioner that it is an organization described in section 501(c)(3) and is exempt from taxation under section 501(a).

An appropriate order and decision will be entered.[18]

Reviewed by the Court.

NIMS, WHITAKER, SHIELDS, HAMBLEN, SWIFT, GERBER, PARR, WILLIAMS, and WELLS, *JJ.*, agree with the majority opinion.

CHABOT, *J.*, dissenting: The majority hold that an organization does not participate in political campaigns on behalf of candidates for public office when the organization rates the qualifications of candidates for elective judicial public office, and publishes those ratings with the hope that the ratings will influence the voters. I would hold that this activity constitutes participation in political campaigns on behalf of the more highly rated candidates, and thereby violates the restrictions of section 501(c)(3).

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[18] Petitioner filed a motion for oral argument in this case, dated July 10, 1986, which motion was objected to by respondent. Based on all of the foregoing, petitioner's motion is deemed unnecessary and is hereby denied.

Tax Court Decision

I. *The Statute*

Petitioner asks us to declare, under section 7428,[1] that it is a section 501(c)(3) organization. The relevant portions of section 501(c)(3) are set forth *supra*, in the majority's opinion at note 7. As may be seen from the text of section 501(c)(3), an organization must clear each of many separate hurdles in order to be described in section 501(c)(3). Such an organization must show the following:

(1) It is organized exclusively for one or more of the purposes listed in the statute; *and*

(2) It is operated exclusively for one or more of these listed purposes; *and*

(3) No part of its net earnings inures to the benefit of any private shareholder or individual; *and*

(4) No substantial part of its activities constitutes lobbying; *and*

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[1] Sec. 7428(a) provides, in pertinent part, as follows:

> SEC. 7428. DECLARATORY JUDGMENTS RELATING TO STATUS AND CLASSIFICATION OF ORGANIZATIONS UNDER SECTION 501(c)(3), ETC.
>
> (a) CREATION OF REMEDY.—In a case of actual controversy involving—
>
> (1) a determination by the Secretary—
>
> (A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2),
>
> * * *
>
> upon the filing of an appropriate pleading, the United States Tax Court * * * may make a declaration with respect to such initial qualification * * *. Any such declaration shall have the force and effect of a decision of the Tax Court * * * and shall be reviewable as such. * * *

(5) It "does not participate in or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office", commonly referred to as "electioneering".

As we state in *Hancock Academy of Savannah, Inc.* v. *Commissioner,* 69 T.C. 488, 492 (1977), "the requirements for exemption under section 501(c)(3) are stated in the conjunctive; failure too satisfy any one of them will prevent exemption."

II. *The Facts*

The majority have found as follows:

Petitioner states that one of its "principal activities" is the rating of "candidates for judicial office". (P. 601.)

The ratings ("approved", "not approved", or "approved as highly qualified") are made known to petitioner's members and "are released to the general public in the form of press releases". (P. 603.)

Sometimes, all the competing candidates for a given position receive the same rating. (P. 604.) During the 5 years from 1980 through 1984, only 56 percent of the judicial candidates were rated "approved", while 42 percent were rated "not approved". Evidently, competing candidates often do not receive the same rating. See table on p. 604.

"[T]here obviously would be no point to making the ratings if they were kept secret, and it is equally obvious that the ratings are published with the hope that they will have an impact on the vote." (P. 610.)

III. *Applying the Facts to the Law*

Although many maintain that popular election of judges is bad, for a variety of reasons (and the Federal judiciary has been appointive from its inception), New York State

chooses to retain popular elections for most judges, as do many other jurisdictions in the United States.[2]

Although the details of the process may vary from jurisdiction to jurisdiction, it does not appear that there is any doubt that, in New York, each of the judicial candidates who runs in the party primaries and then on party lines in the general election is (in the words of sec. 501(c)(3)) a "candidate for public office" and is conducting a "political campaign".

The majority's findings make it clear that petitioner's ratings are attempts to influence the voters in these political campaigns to support "approved" candidates over "not approved" candidates. It is apparent, from the table in the majority's opinion (p. 604), that the "approved" rating is not routinely granted and that, in many cases, petitioner provides and publishes ratings that prefer some candidates over others.[3]

Thus, it seems to be clear that one of petitioner's "principal activities" is to participate in political campaigns on behalf of candidates for public office. For the past 33 years, the Congress has said that this is an impermissible activity for section 501(c)(3) organizations. It follows that petitioner fails one of the requirements for section 501(c)(3) status, and our declaratory judgment, in the instant case, should be for respondent.

The majority point out that petitioner is already exempt under section 501(a) as an organization described in sec-

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[2] The elective process has produced many of our Nation's shining judicial adornments. We deal with New York State in the instant case. A New Yorker, Benjamin N. Cardozo, may well be the supreme example of how the popular elective process can work to place highly qualified people into judicial office.

[3] Presumably, petitioner's rating of five candidates during this period as "approved as highly qualified" would be understood by voters as an indication that the voters ought to vote for those five, even in preference to candidates who received "approved" ratings.

tion 501(c)(6) (p. 600) and that respondent does not propose to change his favorable ruling on that score (p. 605), but the majority imply that petitioner's real objective in this litigation may be to achieve eligible contribution donee status under sections 170 (as to which we clearly have authority under sec. 7428(a)(1)(A) to render a declaratory judgment), 2055, 2106, and 2522. (P. 600.) As the majority also point out, for the past 18 years the Congress has said that the section 501(c)(3) anti-electioneering rules apply to the charitable contribution provisions as well to section 501(c)(3), itself. (Pp. 607-608.)

IV. *Other Matters*

Nonpartisan, Nonpolitical, Objective

The majority seem to believe that it is relevant that "Petitioner does not base its ratings on partisan or political preferences" and that petitioner intends its standards to be "objective". (P. 611.)

The Congress has made the provision we deal with depend on participation in a "political campaign", and the judicial elections here involved clearly are political campaigns. Nothing in the statute suggests that participation in a political campaign is to be ignored if it proceeds from nonpartisan or "nonpolitical" preferences. Nor does anything in the statute suggest that "objective" determinations to urge voters to vote for certain candidates are permissible, that only nonobjective determinations are forbidden. Objectivity may be relevant in determining whether the organization is operating exclusively for educational purposes (see sec. 1.501(c)(3)-1(d)(3)(i), Income Tax Regs.), but neither the statute nor the regulation draws this line with regard to the anti-electioneering requirement. See,

e.g., *Hancock Academy of Savannah, Inc.* v. *Commissioner, supra,* to the effect that failure to satisfy any one of the requirements of paragraph (3) of section 501(c) will prevent exemption under that paragraph.

Voter Education

The majority state that the narrow issue is whether "petitioner's rating activities do not constitute permissible voter education activities." (P. 609.)

Petitioner provides voters with little information explaining "not approved" ratings and no information at all explaining "approved" and "approved as highly qualified" ratings. (P. 611.) As a result, it hardly seems that petitioner's candidate rating activity could qualify as "educational". See sec. 1.501(c)(3)-1(d)(3)(i), Income Tax Regs., which provides in relevant part as follows:

> An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.

What petitioner did is far from what most would regard as voter education. Organizations that conduct voter education activities urge citizens to register to vote, they urge citizens to enroll in the party of their choice and vote in primary elections (where this is the procedure under their State's laws), they urge people to vote in general elections, and they explain why it is an obligation of citizens to do so in this Nation and a privilege that is nonexistent or not meaningful in much of the rest of the world. Voter education activities focus on giving voters and candidates

access to each other on an impartial basis, i.e., access to and by all the candidates and not merely those favored by the organization's leaders or by a special rating committee.

Passive Activity

The majority seem to believe that it is not only relevant, but "important to note that petitioner merely reports its ratings and does not actively seek to influence the outcome of elections, for example, by distributing statements or other campaign literature on behalf of or in opposition to any candidate." (P. 611.)

Firstly, the majority have found that petitioner's ratings "are released to the general public in the form of press releases". (P. 603.) The majority acknowledge that "there obviously would be no point to making the ratings if they were kept secret, and it is equally obvious that the ratings are published with the hope that they will have an impact on the voter." (P. 610.) That petitioner, because of the prestige it enjoys, can achieve its desired effect in a dignified manner does not take away from the fact that it acts in a manner intended to affect the outcome of the elections on behalf of certain candidates for public office and in opposition to other candidates for public office. It is as active as it needs to be in order to make its endorsements known to the public.

Secondly, the statutory reference to "including the publishing or distribution of statements" is merely an illustration of the kind of activity that is subject to the statutory prohibition. It is likely that the Congress inserted this parenthetical into the last clause of section 501(c)(3) out of an abundance of caution, to prevent someone from seriously contending that publishing or distributing of materials written by others is not within the prohibition. In any event, nothing in the statute's text or its legislative his-

tory indicates that this phrase is intended to swallow up the whole rule; rather, the use of the word "including" to introduce the phrase indicates that the enumerated activities are not all-inclusive.

Consequences

Many section 501(c)(3) organizations have an interest in certain legislation, or other governmental matters. The majority's opinion will permit churches and synagogues, for example, to endorse (approve) or oppose (not approve) candidates for public elective office on the basis of where they stand on permitting abortions or using public funds for abortions.

Organizations that focus on research to prevent, cure, or ameliorate the effects of specific diseases will not only be able to "lobby" public officials (as they now may clearly do within limits, see sec. 501(h)), but they may threaten recalcitrant officials with retribution at the polls (by brandishing their membership lists and press releases). Indeed, if the organizations perceive that funds are limited, this may turn into a battle among the organizations, with victory perhaps dependent on the length of their respective membership lists.

A university may circularize its alumni to exert unified power at the polls in support of "qualified" candidates, i.e., those who agree with the university's positions on any of a wide range of items, from unrelated business income tax, to nuclear-free zones, to boycotting goods from specific countries.

The only care that must be taken, in order to fit within the majority's opinion, is that the section 501(c)(3) organization limit its nonmembership electioneering to press releases.

That may be the law as some of us would wish it to be, but that is not the law that the Congress wrote.

V. *Conclusion*

Petitioner "flat-out" told the public that certain candidates for public office should be voted for and other candidates should be voted against. It made an effort to get this message to the voting public by issuing press releases. It intended that the voters be persuaded by this advice as to which candidates to vote for or against.

Petitioner thereby violated one of the specific requirements of the statute whose benefits it seeks. The Congress put the anti-electioneering provision into the law in 1954. After what some might regard as a "loophole" became apparent in *Dulles* v. *Johnson,* 273 F.2d 362 (2d Cir. 1959), the Congress added the anti-electioneering provision to the successor of the estate tax provision interpreted in *Dulles* v. *Johnson* and also to the income and gift tax provisions.

Petitioner, a prestigious bar association, appears to perform a useful function for the people of New York. Apparently, but for this activity, petitioner would qualify for section 501(c)(3) status.

We should not twist the language of the statute merely because petitioner is prestigious or because this activity, when done with care and highmindedness, may justly be viewed as an example of the legal professional acting honorably to uphold and heighten the standards of the judiciary.

As members of the bar and the bench, we may applaud petitioner for its work, but we do no honor to the bar or to the bench when we ignore or twist the language of the statute because the statute fails to suitably reward petitioner's good work.

The Congress wrote the statute; we might have written this provision differently or not at all; we should apply the statute as the Congress wrote it.

Respectfully, I dissent.

PARKER, COHEN, CLAPP, JACOBS, and WRIGHT, *JJ.*, agree with this dissent.

JACOBS, *J.*, dissenting. Although I share the views of Judge Chabot, I wish to separately state my dissent.

To qualify for tax exemption under section 501(c)(3), an organization cannot participate or intervene in any political campaign on behalf of any candidate for public office. By rating those candidates seeking elected judicial office and by publishing such ratings, petitioner is, in my opinion, intervening in the process of electing judges. Where more than one candidate seeks an elected judicial office, petitioner's rating of one candidate higher than another is tantamount to an endorsement by petitioner of the candidate it deems more qualified. Regardless of petitioner's motives, this constitutes a prohibited intervention. The fact that petitioner may be performing a valuable service to the electorate is, in this instance, of no import. Such may be regrettable; nevertheless, it is the law.

CHABOT and CLAPP, *JJ.*, agree with this dissent.

Appendix C—Letter From Internal Revenue Service Dated December 19, 1987

INTERNAL REVENUE SERVICE

Department of the Treasury

[LETTERHEAD]

The Association of the Bar
of the City of New York
42 West 44th Street
New York, New York 10036

CERTIFIED MAIL

Employer ID Number:
13-0453095
Key District:
Brooklyn

Gentlemen:

This is a final adverse determination as to your exempt status under section 501(c)(3) of the Internal Revenue Code.

Our adverse determination was made for the following reason:

Your rating activities constitute intervention or participation in political campaigns on behalf of candidates for public office which is prohibited under section 501(c)(3) of the Code.

Contributions to your organization are not deductible under Code section 170.

If you decide to contest this determination under the declaratory judgement provisions of Code section 7428, a petition to the United States Tax Court, the United States

Court of Claims, or the district court of the United States for the District of Columbia must be filed within 90 days from the date this determination was mailed to you. Contact the clerk of the appropriate court for rules for filing petitions for declaratory judgement.

We will notify the appropriate State officials of this action, as required by Code section 6104(c).

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely yours,

Associate Chief
Appeals Office

cc: M. Bernard Aidinoff, Esq.
c/o Sullivan & Cromwell
125 Broad Street
New York, New York 10004

Appendix D—Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

U.S. TAX COURT—6715-86X

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of September one thousand nine hundred and eighty-eight.

Present: Hon. Ellsworth A. Van Graafeiland, C.J.
Hon. J. Daniel Mahoney, C.J.
Hon. Charles M. Metzner, D.J.*

Circuit Judges,

88-4001

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Petitioner-Appellee,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

Appeal from the United States Tax Court.

This cause came to be heard on the transcript of the record from the United States Tax Court, and was argued by counsel.

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* Hon, Charles M. Metzner, senior District Judge for the Southern District of New York, sitting by designation.

Judgment of the Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said Tax Court be and it is hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH,
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

FILED
SEP 27 1986
ELAINE B. GOLDSMITH, *clerk*

The Mandate, Consisting of the
Items Below, Has Been Received,
|. . . . . | Opinion |. . . . . | Order
|. . . . . | Statement of Costs
Rec'd. by . . . . . Date . . . . . .

Appendix E—Statutes Involved

26 U.S.C. § 501

(a) EXEMPTION FROM TAXATION.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

* * *

(c) LIST OF EXEMPT ORGANIZATIONS.—The following organizations are referred to in subsection (a):

* * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

(2)

Supreme Court, U.S.
FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1053

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
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17pp

QUESTION PRESENTED

Whether petitioner's practice of rating candidates in judicial elections constitutes "participat[ion] in, or interven[tion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office" within the meaning of Section 501(c)(3) of the Internal Revenue Code, thereby precluding petitioner from qualifying for tax-exempt status under that section, rather than under Section 501(c)(6).

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1053

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 858 F.2d 876. The opinion of the Tax Court (Pet. App. 14a-41a) is reported at 89 T.C. 599.

JURISDICTION

The judgment of the court of appeals (Pet. App. 44a-45a) was entered on September 27, 1988. The petition for a writ of certiorari was filed on December 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was incorporated as a bar association in 1871 to promote the legal profession and the administration of justice. One of its significant activities is rating

candidates for elective and appointive judgeships on municipal, state, and federal courts that sit in New York City. Pet. App. 3a. This activity is undertaken pursuant to petitioner's bylaws, which provide that its Committee on the Judiciary "shall endeavor to secure the nomination, election, certification, or appointment of qualified candidates, [and] to prevent the nomination, election, certification, or appointment of unqualified candidates" (*id.* at 6a).

The task of considering the candidates' qualifications and determining the ratings is assigned to petitioner's Committee on the Judiciary. The Committee considers a candidate's professional ability, experience, character, and temperament. It then rates the candidates as either "approved," "not approved," or "approved as highly qualified," and those ratings are communicated to the public in the form of press releases.[1] A "not approved" rating sometimes is accompanied by a short statement explaining the reasons for the rating; no explanation is given for an "approved" rating. Of approximately 270 candidates for elective judgeships evaluated from 1980 through 1984, somewhat more than half were "approved," somewhat less than half were "not approved," and five were "approved as highly qualified." Pet. App. 3a, 19a-21a.

Petitioner has long been recognized as a "business league" exempt from tax under Section 501(c)(6) of the Internal Revenue Code.[2] In 1982, petitioner applied to the

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[1] The record also states that the ratings are published in petitioner's journal, which is distributed to its members and to approximately 120 other subscribers, including law libraries and law schools. Petitioner states, however, that this practice was discontinued in 1981. See Pet. App. 21a n.4.

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1986 (26 U.S.C. (Supp. IV 1986)), as amended (the Code or I.R.C.).

Commissioner for recognition as a "charitable" and "educational" organization under Section 501(c)(3) (Pet. App. 4a, 16a). Qualifying for tax-exempt status under Section 501(c)(3) would confer additional tax advantages upon petitioner and its contributors. For example, a donation to a Section 501(c)(3) organization is deductible as a charitable contribution for purposes of computing the donor's income, estate, or gift tax liability (see I.R.C. §§ 170(c)(2), 2055(a)(2), and 2522(a)(2)), whereas contributions to a Section 501(c)(6) business league are not deductible. Correspondingly, there are additional limitations on eligibility for Section 501(c)(3) exempt status. In particular, Section 501(c)(3) organizations, unlike business leagues, may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[3]

2. The Commissioner denied petitioner's application on the ground that its practice of rating candidates for elective judicial office constitutes intervention or participation in political campaigns, which is prohibited for a Section 501(c)(3) organization (Pet. App. 4a, 42a-43a).[4] Pursuant to Section 7428(a) of the Code, petitioner

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[3] The parenthetical phrase "or in opposition to" was added to Section 501(c)(3) by Section 10711(a) of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-464. The legislative history accompanying this amendment explains that it is a "statutory clarification," and that "[t]he same rule applies, pursuant to Treasury Regulations, to activities occurring on or prior to the date of enactment." H.R. Rep. No. 391, 100th Cong., 1st Sess. 1622 (1987); H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 1018 (1987). See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

[4] The Commissioner has made no claim that petitioner's practice of rating candidates for *appointive* judgeships is inconsistent with Section 501(c)(3) status.

brought an action in the Tax Court for a declaratory judgment that it qualifies as a Section 501(c)(3) organization. The Tax Court, in a 10-6 decision, held for petitioner, ruling that its judicial rating activity does not constitute prohibited intervention in political campaigns (Pet. App. 14a-32a).

The Tax Court majority acknowledged that it is "obvious that the ratings are published with the hope that they will have an impact on the voter" (Pet. App. 31a), but it concluded nonetheless that the ratings are permissible under Section 501(c)(3), stating that "[t]he ratings do not support or oppose the candidacy of a particular individual or recommend that the public vote for or against a specific candidate" (Pet. App. 30a). The majority indicated that the ratings belong in the category of "permissible voter education activities" (*id.* at 28a), reasoning that "[t]he ratings are based on each candidate's professional experience and technical ability as compared to standards that petitioner intends to be objective," rather than on "partisan or political preferences" or "comparisons between candidates seeking the same office" (*id.* at 31a).

Judge Chabot, joined by five other judges, dissented (Pet. App. 32a-41a). He noted that the majority's assertions that petitioner's ratings are "objective" and "nonpartisan" provide no basis for avoiding the statutory prohibition (*id.* at 36a). He also stated that "[w]hat petitioner did is far from what most would regard as voter education" (*id.* at 37a). He concluded that petitioner's activities violate the Section 501(c)(3) limitation because "[p]etitioner 'flatout' told the public that certain candidates for public office should be voted for and other candidates should be voted against [and] [i]t made an effort to get this message to the voting public by issuing press releases" (Pet. App. 40a). Judge Jacobs, joined by two judges, wrote a separate dissent (*id.* at 41a). He explained that petitioner's

rating activity "constitutes a prohibited intervention" because "[w]here more than one candidate seeks an elected judicial office, petitioner's rating of one candidate higher than another is tantamount to an endorsement by petitioner of the candidate it deems more qualified" (*ibid.*).

3. The court of appeals unanimously reversed, holding that petitioner's rating activity falls squarely within the electioneering proscription of Section 501(c)(3) (Pet. App. 1a-13a). The court concluded that, even if the ratings are in the public interest, they express a preference for one candidate over another and therefore violate Section 501(c)(3)'s requirement that charitable organizations remain neutral in political affairs (*id.* at 5a, 9a). The court disagreed with petitioner's assertion that the ratings involve merely the collection and dissemination of "objective data," stating that "[a] representation that a candidate is able and has proper character and temperament is simply a subjective expression of opinion" (*id.* at 10a). The court also rejected petitioner's assertion that the ratings constitute neutral voter education activities; the court stated that "[p]ublished expressions of such opinion, made with an eye toward imminent elections, are a far cry from" voter education activities that the IRS has found to be permissible in the past (*id.* at 10a).

ARGUMENT

The court of appeals correctly held that petitioner is not entitled to tax-exempt status under Section 501(c)(3) because it rates candidates for elective judgeships as "approved" or "not approved" and publicizes those ratings with a view to influencing the outcome of elections. The court's decision that this activity constitutes participating or intervening in political campaigns within the meaning of Section 501(c)(3) does not conflict with any decision of

this Court or of another court of appeals. Accordingly, there is no reason for review by this Court.

1. Restrictions upon the legislative and political involvements of tax-exempt charitable organizations date back to the Revenue Act of 1934. That statute expressly provided that an organization, otherwise qualifying as "religious, charitable, or educational," was not entitled to a tax exemption or to have contributions to it be tax-deductible, if a substantial part of its activities was "carrying on propaganda, or otherwise attempting, to influence legislation." Revenue Act of 1934, ch. 277, §§ 23(o)(2), 101(6), 48 Stat. 690, 700. As this Court observed in *Cammarano* v. *United States,* 358 U.S. 498, 512 (1959), those provisions, as carried forward into the 1939 and 1954 Codes, express "a sharply defined policy" that " 'political agitation as such is outside the statute, however innocent the aim. * * * Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.' " This policy is a neutral one that does not turn upon the motivations of the organization or the subject of its political activity. Accordingly, this Court twice has rejected First Amendment challenges to the lobbying restrictions of the Code and regulations, reasoning that they are neutral respecting the content of an organization's advocacy and do not " 'ai[m] at the suppression of dangerous ideas.' " *Regan* v. *Taxation With Representation,* 461 U.S. 540, 548 (1983); *Cammarano* v. *United States,* 358 U.S. at 512-513; see also *id.* at 515 (Douglas, J., concurring).

In reenacting the exemption for charitable organizations as part of the 1954 Code, Congress added the proviso at issue here, requiring that a Section 501(c)(3) organization "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." (ch. 736,

§ 501(c)(3), 68A Stat. 163 (1954)). This prohibition was extended in 1969 to the provisions governing the deductibility of charitable contributions, making it explicit that a charitable organization that participates or intervenes in any political campaign is ineligible to receive tax-deductible gifts. See Sections 170(c)(2) (income tax), 2055(a)(2) (estate tax), and 2522(a) (gift tax), as amended by the Tax Reform Act of 1969, Pub. L. No. 91-172, § 201, 83 Stat. 549. The House and Senate Reports on the 1969 Act explain that the principal aim of this limitation is to prevent charities from using tax-exempt or tax-deductible dollars to further the cause of a candidate in a public election. The Reports observe that the legislative policy against such tax subsidies is "clear," and that, under the charitable exemption provisions, "no degree of support for an individual's candidacy for public office is permitted." H.R. Rep. No. 413, 91st Cong., 1st Sess. Pt. 1, at 32 (1969); S. Rep. No. 552, 91st Cong., 1st Sess. 47 (1969). Congress reaffirmed this policy again in 1987 when it made a change in the language of Section 501(c)(3) (see note 3, *supra*). The House Report on that legislation stated that "[t]he prohibition on political campaign activities and the restrictions on lobbying activities by charities reflect Congressional policies that the U.S. Treasury should be neutral in political affairs" (H.R. Rep. No. 391, 100th Cong., 1st Sess. 1625 (1987)).

2. Petitioner's practice of rating candidates for elective judgeships violates the express terms of Section 501(c)(3)'s limitation that a qualifying charitable organization "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Those whose qualifications for election petitioner evaluates clearly are "candidates for public office" within the meaning of the statute; that phrase has long been de-

fined by regulation as "a contestant for an elective public office, whether such office be national, State, or local." Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). And the public dissemination of the ratings plainly constitutes "participat[ion] or interven[tion] in * * * political campaign[s]" on behalf of the candidates who are "approved" and in opposition to those who are "not approved." Indeed, petitioner's rating activity falls within the precise example given in the statute itself as an illustration of impermissible political activity, the "publishing or distributing of statements." As a practical matter, petitioner's rating system is no different from the issuance of endorsements urging the electorate to vote for certain candidates and not for others.[5] Although the ratings are terse, they suffice to get their point across, they are widely circulated, and they carry the weight of petitioner's prestige.

The impact of petitioner's rating activity on the political process is no accident; the ratings implement petitioner's declared intent of influencing the candidates' success or failure at the polls. Petitioner's by-laws state as one of its objectives to "secure the * * * election" of candidates whom it considers to be "qualified" and to "prevent the * * * election" of candidates whom it considers to be "unqualified" (Pet. App. 6a). To that end it publicly disseminates the ratings through press releases. As the Tax Court cogently observed (*id.* at 31a), "there obviously would

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[5] Petitioner does not necessarily take a position in every campaign that is equivalent to an endorsement of one candidate over another. If both candidates receive the same rating, and petitioner issues no further information, then its rating may not seek to induce the electorate to vote for a particular candidate rather than his named opponent. But in those situations where competing candidates receive different ratings, petitioner's dissemination of its ratings undeniably has the effect of intervening in the election by seeking to influence voters to cast their ballots for or against a particular candidate.

be no point to making the ratings if they were kept secret, and it is equally obvious that the ratings are published with the hope that they will have an impact on the voter." Indeed, petitioner acknowledged below that the ratings attempt to "ensure" that candidates whom it views as unqualified are not elected to office (*id.* at 11a). Empirical evidence, moreover, indicates that judicial ratings of this type do influence the electorate (*id.* at 7a). Accordingly, petitioner's rating activity is inconsistent with the language of Section 501(c)(3)'s prohibition upon electioneering and with its underlying principle that such campaign activity may not be conducted by a tax-exempt charity.

3. a. Petitioner contends that Section 501(c)(3)'s proscription against participating in political campaigns does not apply to its rating activity. Its main argument is that the ratings are permissible because they are "disinterested [and] nonpartisan" and "conducted as a public service" (Pet. 7, 9). The court of appeals correctly rejected this argument. As the court explained (Pet. App. 5a, 9a), the narrow question here is not whether the ratings perform a public service—the First Amendment, after all, assumes that political campaigning in general performs a public service—but rather whether petitioner's activities violate Section 501(c)(3)'s requirement that tax-exempt charitable organizations refrain from taking sides in election campaigns. Whether or not petitioner acts in an objective and nonpartisan manner in making its ratings, its activity supports one candidate over another and hence violates the statutory limitation.[6]

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[6] There is no merit to petitioner's suggestion (Pet. 8-9) that the statutory limitation should not apply to its activities because, irrespective of its ratings, New York "voters overwhelmingly support the nominee of the dominant Democratic Party" (Pet. 3). Plainly, application of the statutory limitation does not depend upon the success or effectiveness of the charity's electioneering activity, nor would it be

Moreover, petitioner's ratings violate the spirit, as well as the letter, of Section 501(c)(3). Though designed to further the public interest, even the Tax Court acknowledged that petitioner's ratings, like any other organization's political endorsement, "by their very nature, necessarily will reflect the philosophy of the organization" (Pet. App. 31a; see also *id.* at 10a). A similar contention to petitioner's could be made by any number of "nonpartisan" interest groups that rate candidates according to the degree to which their views, record, or qualifications accord with the group's philosophy. It is precisely to avoid discriminating among organizations according to their philosophies that the statutory prohibition upon political conduct by tax-exempt charities, like the similar restriction upon their lobbying, does not depend upon whether the cause or candidate favored by a charity is good or bad, competent or incompetent, orthodox or radical. As the Court of Claims stated in connection with the lobbying limitation, "the tax laws are not an appropriate vehicle for the Government to undertake to determine the extent to which a charitable organization's attempts to influence legislation involve the public interest or are to further other interests" (*Haswell* v. *United States,* 500 F.2d 1133, 1150 (1974), cert. denied, 419 U.S. 1107 (1975)). See also *Kuper* v. *Commissioner,* 332 F.2d 562, 563 (3d Cir.), cert. denied, 379 U.S. 920 (1964) ("Congress wisely refrained from distinguishing between types of legislation."). This neutral, hands-off statutory policy denying Section 501(c)(3) status to any organization that throws its weight behind one candidate or another in an election enables the government to steer clear of discrimination with respect to granting tax benefits and of possible First Amendment dif-

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feasible for the IRS to assess that effectiveness in every case in which it must make a determination whether to grant tax-exempt status.

ficulties. And this statutory policy requires denial of petitioner's request for Section 501(c)(3) status, "[r]egardless of petitioner's motives" in rating judicial candidates (Pet. App. 41a (Jacobs, J., dissenting)).

b. The court of appeals likewise was correct in rejecting petitioner's argument (Pet. 6-9) that its rating activity amounts to voter "education" permitted by Section 501(c)(3). As Congress explained in the legislative history of the 1987 amendments, "neutral voter education activities," *i.e.*, those that are neither "on behalf of" nor "in opposition to" a candidate, are permissible under Section 501(c)(3). H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 1021 (1987). Thus, the Commissioner has ruled that a charitable organization may publish certain objective information (such as the voting records of incumbents or candidates' responses to questionnaires) that lets readers draw their own conclusions about the fitness of a candidate for elective office. See Rev. Rul. 78-248, 1978-1 C.B. 154. The organization, however, must avoid "evidencing a bias or preference with respect to the views of any candidate" (*ibid.*), attempting to "promote or advance one candidate over another" (Rev. Rul. 86-95, 1986-2 C.B. 73), or making a "comment * * * on an individual's overall qualifications for public office" (Rev. Rul. 80-282, 1980-2 C.B. 178). The court of appeals correctly observed that "[t]he inapplicability of these criteria to the activities of [petitioner] is readily apparent" (Pet. App. 11a).

More generally, the term "education" under Section 501(c)(3) connotes a "full and fair exposition" that permits the public to form an independent conclusion; it does not mean "the mere presentation of unsupported opinion." See Treas. Reg. § 1.501(c)(3)-1(d)(3). There is little or no "education" in petitioner's ratings in the sense intended by the tax law. See Pet. App. 12a. They are merely terse announcements in favor of or against a particular candidate

that give the voters no explanation of why they should cast their ballots that way, other than that it is petitioner's opinion that they should.

4. Petitioner's concern that "[t]he decision below will have a negative impact on the organized bar's efforts to aid in the selection of qualified jurists" (Pet. 5) is an objection that should be made to Congress, not to this Court (see Pet. App. 13a, 40a-41a (Chabot, J., dissenting)). In any event, this concern is considerably overstated. The applicable Revenue Rulings provide guidance regarding the political education activities that an organization may conduct without running afoul of the statutory prohibition against electioneering. For example, if petitioner were to sponsor a public forum where competing candidates for elective judgeships each have a fair chance to present their qualifications and positions, such activity might well be consistent with Section 501(c)(3) status so long as it is performed on a neutral basis.

Moreover, the tax consequences of the statutory restrictions can often be ameliorated by an association's adoption of a dual structure, whereby some or all of its charitable and educational functions are split off and conducted through one or more separate foundations that qualify under Section 501(c)(3) and hence are eligible to receive tax-deductible charitable donations. See *Regan* v. *Taxation With Representation,* 461 U.S. at 544; *id.* at 552-553 (Blackmun, J., concurring). The American Bar Association and its affiliates are structured in this way, with part operating as a "business league" under Section 501(c)(6) like petitioner and other parts operating with a charitable Section 501(c)(3) exemption. See *United States* v. *American Bar Endowment,* 477 U.S. 105, 107 (1986). Because it operates out of a single entity, however, petitioner's involvement in political campaign activity disqualifies it from obtaining an exemption under Section 501(c)(3).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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March 27, 1989

Rule 28.1 Statement

Petitioner has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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PETITIONER'S REPLY BRIEF

Respondent does not deny that this case presents an important issue affecting the organized bar's efforts to promote a professionally qualified judiciary in the 43 states in which judges are elected. Nor does respondent take exception to the Court of Appeals' statement that petitioner's rating activities are "clearly in the public interest" (Pet. App. 5a). Instead, respondent opposes certiorari solely on the partisan ground that the Court below decided this case "correctly" (Resp. Br. 5). That contention, we submit, is without merit.

I.

Respondent improperly substitutes his own version of the facts for the findings made by the Tax Court. As the Court of Appeals did not set aside these findings as "clearly erroneous," they are not subject to challenge here. *See* 26 U.S.C. § 7482(a); F. R. Civ. P. 52(a); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

Thus respondent is incorrect in asserting that petitioner's ratings constitute "endorsements urging the electorate to vote for certain candidates and not for others" (Resp. Br. 8) and that "its activity supports one candidate over another" (Resp. Br. 9). The Tax Court's findings are to the contrary: "The ratings do not support or oppose the candidacy of any particular individual or recommend that the public vote for or against a specific candidate" (Pet. App. 30a).

Similarly, respondent's claim that petitioner's ratings are "widely circulated" (Resp. Br. 8) cannot be squared with the Tax Court's findings: petitioner "merely reports its ratings and does not actively seek to influence the outcome of elections," and this activity is "totally passive" and not "political campaign" intervention (Pet. App. 31a-32a).

Such impermissible attempts to override the Tax Court's findings pervade respondent's entire brief. It is the findings of the Tax Court, and not respondent's revisionist view of the facts, that frame the issue before this Court. Those findings compel the conclusion that petitioner is entitled to Section 501(c)(3) status.

II.

Respondent misconstrues the Tax Court's statement that petitioner publishes its ratings "with the hope that they will have an impact on the voter" (Resp. Br. 4, quoting Pet.

App. 31a). Respondent does not deny that virtually all New York City judicial elections are either uncontested or noncompetitive and that, in practice, judges are chosen by political leaders. In that context, the Tax Court's statement means no more than that petitioner seeks to make voters aware of the professional qualifications of judicial candidates in order to build public support for an improved judiciary and to prod political leaders to select professionally qualified candidates (Pet. 3, 8-9). The record contains no evidence that petitioner's ratings have ever affected the outcome of a single judicial election.

In an effort to sidestep these indisputable facts, respondent goes outside the record, asserting that "empirical evidence" indicates that "the electorate" is influenced by "ratings of this type" (Resp. Br. 9). Not only is there no such "evidence" in the record, but the evidence that *is* in the record demonstrates the contrary (*see* Pet. 3).[1]

Respondent's conclusory assertion that "application of the statutory limitation does not depend upon the success or effectiveness of the charity's electioneering activity" (Resp. Br. 9 n.6) ignores the fact that petitioner cannot properly be charged with participation or intervention in a "political campaign" when, in reality, there is no "political campaign" at all because there is only one viable candidate.

Finally, respondent makes the unconvincing plea that it is somehow not "feasible" for him to determine the facts about judicial elections in New York City (Resp. Br. 9-10 n.6)—facts that are common knowledge to millions of New

[1] Respondent does not identify this so-called "empirical evidence" but merely cites to the opinion below (Pet. App. 7a). As pointed out in the petition (Pet. 8-9 n.7), however, the publications referred to in that opinion are not in the record and, in any event, do not support the conclusion that judicial elections are affected either by petitioner's ratings or by bar association ratings in general.

Yorkers. Petitioner has met its burden of demonstrating those facts, as the record in this case abundantly shows, and respondent does not contend otherwise.

III.

Respondent lays heavy stress on a provision in petitioner's present bylaws calling for its Committee on the Judiciary to "endeavor to secure the . . . election . . . of qualified candidates" and "to prevent the . . . election . . . of unqualified candidates" (Resp. Br. 2, 8). Respondent ignores —although both lower courts recognized (Pet. App. 6a-7a, 18a-19a)—petitioner's undertaking to amend its bylaws to omit all references to securing and preventing the election of candidates. Respondent's reliance on petitioner's present bylaws is therefore plain error, as is his implication that petitioner's Section 501(c)(3) status is governed by its "intent" rather than its actions (Resp. Br. 8).

IV.

Implicitly accepting the Court of Appeals' statement that petitioner's rating activities are "clearly in the public interest" (Pet. App. 5a), respondent makes the conventional suggestion that public-interest considerations should be addressed to Congress rather than to this Court (Resp. Br. 12). This is a boot-strap argument resting on the incorrect assumption that service of the public interest is irrelevant to Section 501(c)(3) status. This Court has squarely rejected that assumption. *Bob Jones University* v. *United States*, 461 U.S. 574 (1983). Charities are "given preferential [tax] treatment because they provide a benefit to society," *id.* at 589, and any organization seeking Section 501(c)(3) status "must demonstrably serve and be in harmony with the public interest," *id.* at 592.

In *Bob Jones* this Court denied Section 501(c)(3) status to an otherwise qualified organization solely because it was operated in contravention of public policy. It would be a perversion of the principles established in *Bob Jones* to deny Section 501(c)(3) status to petitioner, which is otherwise qualified, solely because it engages in activities that concededly *advance* the public interest.

V.

Respondent's gratuitous advice as to how petitioner might conduct its affairs so as to avoid adverse tax consequences reveals a misapprehension of the unique function of bar association ratings, which is to inform the public of the professional qualifications of judicial candidates as systematically determined by practicing lawyers. A "public forum" at which judicial candidates trumpet their own qualifications (Resp. Br. 12) clearly would not serve this important purpose. Nor for many bar associations would a "dual structure" (Resp. Br. 12) be feasible; instead of undergoing a cumbersome and costly restructuring, many would simply cease rating judicial candidates altogether, as some already have (Pet. 6).

Deterring bar associations from making such ratings is detrimental to the public interest and contrary to the goal of Section 501(c)(3), which is to "provide tax benefits to charitable organizations [and] to encourage the development of private institutions that serve a useful public purpose . . . ." *Bob Jones University* v. *United States, supra,* 461 U.S. at 588.

CONCLUSION

The issue in this case is important, the decision below is in error, and the petition for certiorari should be granted.

Respectfully submitted,

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